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United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 || v.

14 VIN WHEALEN GAINES JR.,

15 Defendant.

CASE NO. 2:20-CR-0208-JAM

**STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER**

DATE: January 26, 2021

TIME: 9:30 a.m.

COURT: Hon. John A. Mendez

17 This case is set for a status conference on January 26, 2021. By this stipulation, the parties
18 request a continuance of the status conference to March 9, 2021, and to exclude time under Local Code
19 T4.

On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in the Eastern District of California “until further notice.” Further, pursuant to General Order 611, this Court’s declaration of judicial emergency under 18 U.S.C. § 3174, and the Ninth Circuit Judicial Council’s Order of April 16, 2020 continuing this Court’s judicial emergency, this Court has allowed district judges to continue all criminal matters to a date after May 2, 2021.¹ This and previous General Orders, as well as the declarations of judicial emergency, were entered to address public health concerns related to COVID-19.

¹ A judge “may order case-by-case exceptions” at the discretion of that judge “or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020).

1 Although the General Orders and declarations of emergency address the district-wide health
 2 concern, the Supreme Court has emphasized that the Speedy Trial Act's end-of-justice provision
 3 "counteract[s] substantive openendedness with procedural strictness," "demand[ing] on-the-record
 4 findings" in a particular case. *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-
 5 record findings, there can be no exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such
 6 failure cannot be harmless. *Id.* at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153
 7 (9th Cir. 2000) (explaining that a judge ordering an ends-of-justice continuance must set forth explicit
 8 findings on the record "either orally or in writing").

9 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
 10 and inexcusable—General Orders 611, 612, 617, and 618 and the subsequent declaration of judicial
 11 emergency require specific supplementation. Ends-of-justice continuances are excludable only if "the
 12 judge granted such continuance on the basis of his findings that the ends of justice served by taking such
 13 action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C.
 14 § 3161(h)(7)(A). Moreover, no such period is excludable unless "the court sets forth, in the record of
 15 the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of
 16 such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id.*

17 The General Orders and declaration of judicial emergency exclude delay in the "ends of justice."
 18 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address
 19 continuances stemming from pandemics, natural disasters, or other emergencies, this Court has
 20 discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-
 21 week ends-of-justice continuance following Mt. St. Helens' eruption. *Furlow v. United States*, 644 F.2d
 22 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed.
 23 *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to
 24 exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency).
 25 The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated
 26 by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4).²

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status on January 26, 2021.
2. By this stipulation, defendant now moves to continue the status conference until March 9, 2021, and to exclude time between January 26, 2021, and March 9, 2021, under 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4].

3. The parties agree and stipulate, and request that the Court find the following:

- a) The government has represented that the discovery associated with this case includes approximately 428 pages of investigative reports and other documents. All of this discovery has been produced directly to counsel. In addition, the government has made available to defense counsel for inspection numerous video and audio recordings and other materials. The parties are also discussing a potential stipulation for a protective order that would allow the government to produce these materials in lieu of defense counsel reviewing them at the U.S. Attorney's Office.
- b) Counsel for defendant needs additional time to review the discovery, continue discussions regarding a potential stipulated protective order, to confer with his client regarding defense strategy, and to otherwise prepare for trial.
- c) Counsel for defendant believes that failure to grant the above-requested continuance would deny her the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.
- d) The government does not object to the continuance.

² The parties note that General Order 612 acknowledges that a district judge may make “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

e) In addition, because of the public health concerns cited by the General Orders and declarations of judicial emergency, and presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in this case.

f) Based on the above-stated findings, the ends of justice served by continuing the case as requested outweigh the interest of the public and the defendant in a trial within the original date prescribed by the Speedy Trial Act.

g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161, et seq., within which trial must commence, the time period of January 26, 2021 to March 9, 2021, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4] because it results from a continuance granted by the Court at defendant's request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

4. Nothing in this stipulation and order shall preclude a finding that other provisions of the Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial must commence.

IT IS SO STIPULATED.

Dated: January 22, 2021

McGREGOR W. SCOTT
United States Attorney

/s/ DAVID W. SPENCER
DAVID W. SPENCER
Assistant United States Attorney

Dated: January 22, 2021

/s/ JEROME PRICE
JEROME PRICE
Counsel for Defendant
VIN WHEALEN GAINES JR.

1
2
3 **FINDINGS AND ORDER**

4 IT IS SO FOUND AND ORDERED this 22nd day of January, 2021.

5 /s/ John A. Mendez
6 THE HONORABLE JOHN A. MENDEZ
7 UNITED STATES DISTRICT COURT JUDGE